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No. _____

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE KANSAS CITY, MISSOURI SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

THE STATE OF MISSOURI, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the court below erred in this interdistrict school desegregation case by requiring proof that each and every defendant school district committed independent constitutional violations with a segregative effect on the Kansas City, Missouri School District, despite proof that all the defendant districts participated in and were affected by the State-created metropolitan-wide racially dual school system.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Appellant/cross-appellees (now petitioners) the Kansas City, Missouri School District ("KCMSD") and Dr. Claude Perkins, then-superintendent.

Appellants/cross-appellees:

Kalima Jenkins, by her next friend, Kamau Agyei

Carolyn Dawson, by her next friend, Richard Dawson

Tufanza A. Byrd, by her next friend, Teresa Byrd

Derek A. Dydell, by his next friend, Maurice Dydell

Terrance Cason, by his next friend, Antoria Cason

Jonathan Wiggins, by his next friend, Rosemary Jacobs Love

Kirk Allan Ward, by his next friend, Mary Ward

Robert M. Hall, by his next friend, Denise Hall

Dwayne A. Turrentine, by his next friend, Shelia Turrentine

Gregory A. Pugh, by his next friend, Barbara Pugh

Cynthia Winters, by her next friend, David Winters, on behalf of themselves and the class of white and black present and future KCMSD students.

Appellant/cross-appellee Kansas City, Missouri Federation of Teachers Local 691.

Appellees/cross-appellants:

The State of Missouri

Honorable John Ashcroft, Governor of the State of Missouri

Arthur L. Mallory, Commissioner of Education of the State of Missouri

Wendell Bailey, Treasurer of the State of Missouri

The Missouri State Board of Education:

Roseann Bentley
Dan Blackwell
Terry A. Bond, President
Delmar A. Cobble
Grover Gamm
Jimmy Robertson
Robert L. Welling
Donald E. West

Appellees:

Park Hill School District R-5 and Dr. Merlin A. Ludwig, Superintendent

North Kansas City, Missouri School District and Dr. Raymond Waier, Superintendent

School District of the City of Independence and Dr. Robert Henley, Superintendent

Raytown, Missouri Consolidated School District C-2 and Dr. Robert Atkin, Superintendent

Center School District and Donald Richmond, Superintendent

Hickman Mills Consolidated School District C-1 and Blaine E. Steck, Superintendent

Grandview Consolidated School District C-4 and Dr. Tony L. Stansberry, Superintendent

Fort Osage School District R-1 and Victor Gragg, Superintendent

Lee's Summit Reorganized School District R-7 and Dr. Bernard C. Campbell, Superintendent

Blue Springs Reorganized School District R-4 and Dr. Gale T. Bartow, Superintendent

Liberty School District and Dr. Ronald L. Anderson, Superintendent

United States Department of Housing and Urban Development and Secretary Samuel Pierce.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Jenkins* v. *Missouri*, 807 F.2d 657 (8th Cir. 1986) (*en banc*) and is reprinted in the Appendix (App. 5a).[1] The relevant opinions of the United States District Court for the Western District of Missouri are *Jenkins* v. *Missouri* (W.D. Mo. June 5, 1984) (unreported) (App. 274a), and *Jenkins* v. *Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984) (App. 518a).

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[1] "App." refers to the Appendix to the Petition for Writ of Certiorari being filed by Kalima Jenkins, *et al.*, which Appendix is joined by these petitioners.

JURISDICTION

The Eighth Circuit's opinion was rendered on December 5, 1986. The time for a petition for rehearing was enlarged by order of the Eighth Circuit to January 2, 1987, and the Kansas City, Missouri School District filed a timely petition for rehearing on that date. Rehearing was denied by order dated February 5, 1987 (App. 272a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State . . . deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Kansas City, Missouri School District ("KCMSD") filed this lawsuit in 1977 against the State of Missouri and surrounding school districts to remedy the continuing vestiges of the State-mandated *de jure* dual school system.[2] The original complaint alleged that the State, surrounding school districts in Missouri and Kansas, and several federal agencies had helped cause or had been a part of an interdistrict system of racial segregation in the Kansas City metropolitan area schools.[3]

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[2] KCMSD, its board members and superintendent, and named school children in KCMSD schools brought this action on behalf of themselves and the children attending KCMSD schools.

[3] Jurisdiction of the district court was based on 28 U.S.C. §§ 1331, 1343, 1361, 2201 and 2202. The original federal defendants included the Departments of Housing and Urban Development

The case proceeded through discovery to trial in October 1983. At the close of plaintiffs' evidence at trial, the State, the remaining federal agency defendants, and the "suburban" school district defendants ("SSDs")[4] moved for dismissal under Fed. R. Civ. P. 41(b). The district court denied the motions of the State and HUD, but granted the motions filed by HEW and the SSDs.[5] Trial proceeded against the remaining defendants. On September 17, 1984, after the close of all the evidence, the district court found in favor of the plaintiffs against KCMSD and the State and in favor of KCMSD on its cross-claim against the State.[6] The court concluded, as KCMSD itself contended, that vestiges of segregation remained within KCMSD schools.[7] The district court

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("HUD"), Transportation, and Health, Education and Welfare ("HEW"). In 1978, the district court held that KCMSD lacked standing, dismissed it as a plaintiff, and realigned it as a defendant. *School Dist. of Kansas City* v. *Missouri*, 460 F. Supp. 421 (W.D. Mo. 1978), *appeal dismissed*, 592 F.2d 493 (8th Cir. 1979). The 1978 order also dismissed the Kansas defendants as parties. After realignment, the remaining student plaintiffs obtained separate counsel and filed an amended complaint against KCMSD and the federal and Missouri defendants named in the original complaint. KCMSD filed a cross-claim against the State defendants raising the same contentions as in its original complaint.

[4] The term "suburban school districts," utilized in the various opinions below, is something of a misnomer. Nine of the eleven SSDs lie entirely or partly within the City of Kansas City, Missouri, surrounding the inner city school district, KCMSD. KCMSD itself consists primarily of the central core of the City of Kansas City and is approximately one-fourth of the area of the city.

[5] *See* Orders of June 5, 1984 (App. 274a) and July 16, 1984. The court had previously dismissed the Department of Transportation upon plaintiffs' motion. *See* Order of November 1, 1983.

[6] *Jenkins* v. *Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984) (App. 518a). The court also found for HUD on plaintiffs' claims against it. *Id.*

[7] *Id.* at 1492-93 (App. 542a-45a).

found that the State of Missouri established by law a racially "dual school system" in which "[e]ach school district in Missouri participated" prior to 1954. The court found specifically that the State had established the pre-1954 dual school system, that its conduct had fostered the area-wide dual housing market, that each school district had participated in the State-mandated dual system, and that the State had failed to fulfill its duty to help dismantle the dual system.[8]

Pursuant to State law, the pre-1954 separate school system for blacks operated on an interdistrict basis without regard for school district boundaries. State law allowed a district to maintain schools for blacks only if a certain minimum number of black students resided in the district.[9] As of 1874, State legislation permitted adjoining districts with specified numbers of black students to combine to offer joint schools for black children[10] and also authorized the transfer of black students to other districts which had schools for them.[11] Missouri law also

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[8] *Id.* at 1490, 1491, 1503-05 (App. 531a, 536a-37a, 601a-11a).

[9] This number varied over time from eight to twenty. *See, e.g.*, 1865 Mo. Laws 177; 1868 Mo. Laws 170; 1929 Mo. Laws 382-83.

[10] 1874 Mo. Laws 163-64. *See also* 1897 Mo. Laws 219-20 (permitting joinder of adjoining districts for the establishment of black schools if the number of black students in either or both is less than 25).

[11] *See, e.g.*, 1883 Mo. Laws 187; 1889 Mo. Laws § 8004; 1909 Mo. Laws 790-91; 1921 Mo. Laws 611-13 and 626-27; 1929 Mo. Laws 382-83; 1945 Mo. Laws 1699-1700. *See also Adams* v. *United States*, 620 F.2d 1277, 1280, 1294 n.27 (8th Cir.) (*en banc*), *cert. denied*, 449 U.S. 826 (1980); *Jenkins*, 593 F. Supp. at 1490 (App. 531a-32a). As of 1929, State legislation even permitted interdistrict transfers from districts which had sufficient black students to form a black school, thus permitting a district to avoid creating black schools altogether even where the requisite number of black children lived in the district. *See* 1929 Mo. Laws 382-83.

required districts that maintained black schools, like KCMSD, to accept black students from other districts.[12]

In the Kansas City area, therefore, schools for black children were maintained only within KCMSD itself and intermittently in surrounding areas which had sufficient numbers of black students.[13] The effect of these State laws was predictable: Black families who lived in or considered moving to the rural and suburban areas around Kansas City, or even to the portions of the city itself outside KCMSD, found inferior schools—or no schools at all—available to blacks in those communities. Eight of the SSD defendants in this action and their predecessors in the 11-district area outside KCMSD thus provided no schools at all for blacks from World War I through 1954.[14]

The black schools that were established in suburban and rural areas and in the city outside KCMSD provided extremely poor educational opportunities as contrasted with the black schools in KCMSD.[15] As a consequence of

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[12] *See State ex rel. Herman* v. *County Court*, 311 Mo. 167, 277 S.W. 934 (1925); *see also* 1883 Mo. Laws 187; 1889 Mo. Laws 226-27; 1921 Mo. Laws 614, 626-27. As of 1921, State statutes contained specific provisions for payment for interdistrict transfers of black students, although receiving districts generally were required to accept transfer students regardless of whether tuition was paid. *See, e.g., State ex rel. Herman* v. *County Court*, 277 S.W. at 936; *see also* 1921 Mo. Laws 626-27; 1929 Mo. Laws 382-83.

[13] *See* PX 39; Tr. 4,308-12.

[14] *See* Tr. 817, 1,354-56, 1,830-34, 3,749-50; PX 107 at 54.

[15] Black schools in the districts outside KCMSD never received accreditation from the independent North Central Association. *See* PX 39 at 2-6; PX 39A. In contrast, black schools in KCMSD were consistently rated first class by the State, and Lincoln High School in Kansas City received North Central accreditation for many years. PX 39 at 1. Plaintiffs' expert Dr. James D. Anderson, an education historian, concluded that for blacks, "from the establishment of Lincoln High School in 1887 to 1954, . . . this was a one high school area" because it was the best and only consistently available black high school. Tr. 4,334.

this State system, in which KCMSD and all the surrounding defendant districts participated, many black families split up, sent children to live with friends or relatives in KCMSD, or actually moved to KCMSD, in order to obtain a better education for their children in KCMSD schools.[16]

The district court agreed that the State-sponsored racially dual system of education and housing was a factor in black families leaving the surrounding districts and moving to KCMSD; the evidence also showed and the district court also found that the availability of schools and housing was a factor in the decision by blacks moving to the city or the metropolitan area to settle in KCMSD rather than in the surrounding districts.[17] Indeed, offi-

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[16] *See Jenkins*, 593 F. Supp. at 1490-91 (App. 534a-37a). *See also* Tr. 14,817 (for black children, pre-1954 system of education in Kansas City area "operated on a regional basis to force black students to transfer wherever they were permitted to go to school within the metropolitan area"). Many witnesses testified graphically concerning the hardships that black families were forced to endure to provide educational opportunity for their children, with many black families with school age children forced from the SSDs to KCMSD, where their children could be educated, with few such families, if any, ever returning to the SSDs. *See, e.g.*, Tr. 1,201-16; Tr. 1,141-42 (family had to separate so that children could obtain better education); Tr. 890 (family had to pay child's room and board in KCMSD); Tr. 126-28 (sisters lost contact with their parents because they moved to their grandmother's house in KCMSD to attend school and began calling their mother "Miss Rita" because of lack of contact with her).

[17] *See Jenkins*, 593 F. Supp. at 1490, 1491, 1503 (App. 532a, 535a, 601a); Tr. 14,694, 14,782-87, 14,793-99, 14-804-08, 15,285-90 (blacks moving into the Kansas City area located where black schools were located and were particularly drawn to KCMSD, which thus became "a magnet for commercial and residential development for blacks," and the State-sponsored dual system of education and housing "would have inevitably lowered the tendency for blacks to settle in [predominantly white suburban and rural areas and] to remain there if they were settled and had children in need of education"); Tr. 4,310-20, 4,485-86 (black families, particularly

cial State reports as early as the 1920's documented the fact that black families were moving to cities in Missouri—including Kansas City—specifically because of the lack of adequate schools for blacks in rural and suburban areas and because of the better educational opportunities available in the cities.[18]

The evidence at trial further showed that racial segregation in area schools was powerfully reinforced by other types of segregation mandated or encouraged by the State. Missouri state courts continued to enforce racially restrictive covenants until the 1950s, long after this Court declared such actions unconstitutional in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).[19] Restrictive covenants made it impossible for black families to move into many areas of the SSDs, and restricted expansion of

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those with children, would tend not to move into areas where schools were unavailable and left small rural districts for Kansas City); Tr. 16,688-96 (availability of schools was a factor in leading blacks to settle in KCMSD); Tr. 16,833-71, 16,913-15 (blacks migrating into the area from outside Missouri chose to live in Kansas City because of the availability of schools).

[18] *See* Ex. K34 (1929 Report of Missouri State Superintendent of Public Schools) at 122, 123 ("high school opportunity for [N]egro children is very limited" other than in St. Louis and Kansas City; in light of poor education for blacks in areas outside the cities, "the pronounced drift of the [N]egro population away from the farm to the city is quite understandable"); Ex. K31 (1924 State report) at 197 ("[m]any [blacks in rural areas] leave to seek better educational facilities for their children"); Ex. K28 (1914 State report) at 25 ("shortsighted people are driving these [black] people to towns in order to educate their children"); Ex. K30 (1922 State report) at 31 ("[o]n account of the lack of school facilities in many small towns and rural districts there is a desire on the part of the [N]egro population to move to the larger cities").

[19] *See Jenkins*, 593 F. Supp. at 1497, 1503 (App. 568a, 601a); *Adams*, 620 F.2d at 1291 n.21; Tr. 13,005 (judicial notice taken that racially restrictive covenants "were in effect and were enforced in Missouri until in the 1950s").

those small black communities which had existed in the SSDs since the nineteenth century.[20] The district court specifically found that this and other State conduct placed "the State's imprimatur on racial discrimination," that "the State has encouraged racial discrimination by private individuals in the real estate, banking and insurance industries," and that "[t]his has and continues to have a significant effect on the dual housing market in the Kansas City area."[21] The district court further found that the dual housing market "impacted blacks in the KCMSD and consequently caused the public schools to swell in black enrollment"; that "there is an inextricable connection between schools and housing"; and that the availability of schools " 'may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.' "[22]

As a consequence of the State's conduct, the city and its schools became increasingly black, while the SSDs and their schools became increasingly white. Between 1900 and 1950, the black population of Kansas City more than tripled; at the same time, the black population in the three counties outside Kansas City dropped nearly by half.[23] As a result, the percentage of Kansas City area black residents who lived outside the city itself dropped from more than 17% in 1900 to less than 4% in 1950.[24]

These disparities were even more pronounced in the schools. In 1900, black students constituted 6.8% of the

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[20] PX 22; PX 22A (maps showing locations of residential areas and restrictive covenants); Tr. 13,023-28.

[21] *Jenkins*, 593 F. Supp. at 1503 (App. 601a-02a).

[22] *Jenkins*, 593 F. Supp. at 1491 (App. 537a), *quoting Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971).

[23] *See* PX 16B.

[24] *Id.*

student enrollment in the three-county area outside KCMSD, and 8.8% within KCMSD; approximately 22% of Kansas City area black students thus attended school outside the KCMSD.[25] By 1954, however, only 0.8% of the school children in the surrounding districts were black, while the KCMSD percentage had increased to 18.9%.[26] Nearly 98% of all black school children in the Kansas City metropolitan area attended school in KCMSD in 1954, while the SSDs had become virtually all-white.[27]

In the years following *Brown*,[28] the State bypassed numerous opportunities to promote desegregation in the Kansas City area.[29] State legislation and other actions after 1954 actually made desegregative reorganization more difficult.[30] Consequently, although KCMSD generally had expanded along with Kansas City from 1887 to 1950,

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[25] PX 49; PX 53E.

[26] *Jenkins*, 593 F. Supp. at 1492 (App. 542a). While the number of black students in the defendant districts surrounding KCMSD was dropping (from 1445 in 1900 to 368 in 1954), the number of white students in these same districts was increasing dramatically. In 1900, the total white student population in the three counties outside Kansas City was 19,961. PX 53E. By 1954, that population had more than tripled, to 60,798. *Id.* The KCMSD black student population also nearly tripled during the same period, increasing from 5,248 to 14,527. *Id.*

[27] PX 53E, H.

[28] *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954), and *Brown* v. *Bd. of Educ.*, 349 U.S. 294 (1955).

[29] *See Jenkins*, 593 F. Supp. at 1505 (App. 611a) (noting State's "failure to affirmatively act to eliminate the structure and effects of its past dual system").

[30] For example, HB 171, enacted in 1957, limited the ability of KCMSD to expand and acquire a more diverse nonminority population as the Kansas City limits expanded. Tr. 6,145-47; 1,971-72. SB 29, enacted in 1963, changed the procedure for initiating school district annexation from a petition by 10 citizens to a minimum of 10% of the voters in a district contiguous to large city districts such as KCMSD. Tr. 6,158.

the city is now four times as large as KCMSD as a result of city annexations after *Brown* which were not followed by parallel KCMSD annexations.[31]

As the result of the State's failure to dismantle its legacy of mandatory interdistrict segregation, 24 KCMSD schools were "racially isolated" as of 1983-84 "with 90+% black enrollment," and "[v]estiges of the dual system still remain[ing]." [32] Twenty-five KCMSD schools had 90%+ black enrollment as of 1984-85.[33] The composition of area schools reflects the legacy of the interdistrict character of State-mandated segregation in Missouri: In 1982, KCMSD's student population was 68.2% black, while the surrounding defendant districts averaged only 5.2% black—with several of those districts having virtually no black students.[34] Over 88% of the black school children in the metropolitan area attended school in KCMSD in 1980.[35]

Moreover, racial segregation is not the only vestige of the former dual system. As the district court also concluded, the "inferior education indigenous of the [S]tate compelled dual school system has lingering effects" in KCMSD.[36]

Plaintiffs and the KCMSD appealed the district court's dismissal of the surrounding districts.[37] The United

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[31] PX 35A-H.

[32] *Jenkins*, 593 F. Supp. at 1493 (App. 545a).

[33] *Jenkins* v. *Missouri*, 639 F. Supp. 19, 36-37 (W.D. Mo. 1985).

[34] *See* PX 53G. Fully 84% of the black students in the SSDs in 1982 were located in the four SSDs nearest the KCMSD "black corridor." Those four districts averaged 11.8% black enrollment, while the remaining SSDs averaged only 1.3% black enrollment. *Id.*

[35] *Id.*

[36] *Jenkins*, 593 F. Supp. at 1492 (App. 542a).

[37] In order to try to remedy the lingering vestiges within KCMSD of State-mandated segregation—but without the SSDs'

States Court of Appeals for the Eighth Circuit *sua sponte* heard the case *en banc*. On December 5, 1986, the court announced a four-to-four decision that had the effect of affirming the district court's dismissal of the 11 defendant districts surrounding KCMSD.[38] A plurality opinion joined by four judges concluded that the district court correctly found that these school districts had not been shown to have committed independent constitutional violations with a substantial interdistrict effect on KCMSD.[39]

Judge Arnold dissented from the "portions of [the plurality] opinion concerning suburban school district (SSD) participation in a remedy for the interdistrict effects of the State of Missouri's housing violations."[40] Judge Arnold concluded that the district court's dismissal of the surrounding districts rested on a "misconstruction of *Milliken*" v. *Bradley*, 418 U.S. 717 (1974), because it demanded proof of a separate constitutional violation by each district."[41] Judge Arnold explained that "[i]nstead, *Milliken* establishes that an interdistrict remedy is

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participation in the remedy—the district court's first remedial order, issued on June 14, 1985, required the State and KCMSD to fund compensatory and remedial educational programs and necessary initial capital improvements in KCMSD schools; required the State to fund voluntary interdistrict transfers between KCMSD and any of the surrounding districts choosing to participate; and ordered the KCMSD to develop comprehensive magnet school and capital improvement plans. *Jenkins*, 639 F. Supp. at 26-35, 39-41.

[38] *Jenkins* v. *Missouri*, 807 F.2d 657 (8th Cir. 1986) (*en banc*) (App. 5a).

[39] *Id.* at 669-71 (App. 52a-59a). The plurality also believed that statements made by the district court in the course of discussing the issue of constitutional violations by the SSDs precluded a conclusion that the interdistrict effects on the SSDs of the State's constitutional violations warrant an interdistrict remedy. *Id.* at 674 (App. 73a-74a).

[40] *Id.* at 687 (App. 141a).

[41] *Id.* (App. 143a).

justified whenever discriminatory actions of either the state, or local school districts, or both, have had significant interdistrict segregative effects." [42] The State's housing violations may provide a predicate for interdistrict relief, Judge Arnold concluded, and so he would have remanded the case for findings on effects under the proper *Milliken* standard.[43]

Chief Judge Lay authored a dissent, which Judges Heaney and McMillian joined, because the plurality opinion "ignores Supreme Court precedent and brushes aside thirty years of this circuit's rulings mandating school integration." [44] The dissenters explained that "[t]he district court's own conclusions and the clear weight of the uncontradicted evidence establish that constitutional violations, committed by the suburban school districts (SSDs) and HUD as well as the State of Missouri and the KCMSD, have caused significant continuing segregative effects in the SSDs," and that they would reverse because "the district court's factfinding process was tainted with legal error from the start of the trial." [45]

Despite this deep division on the court, the Eighth Circuit nevertheless unanimously endorsed the need for substantial interdistrict relief in this case, in the form of a voluntary interdistrict transfer program which is provided for in the district court's remedial order.[46] However, the surrounding school districts, which were fundamental actors in the State's interdistrict system of

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[42] *Id.* at 688 (App. 148a).

[43] *Id.* at 695 (App. 179a).

[44] *Id.* (App. 182a) (footnote omitted).

[45] *Id.* at 696 (App. 185a).

[46] *See id.* at 683 n.30 (App. 120a-21a); *id.* at 687 (Ross, J., concurring) (App. 139a); *id.* at 687, 695 (Arnold, J., concurring in part and dissenting in part) (App. 141a, 178a-79a); *id.* at 712 n.21. (Lay, C.J., dissenting) (App. 268a).

segregated schools, have consistently refused to participate in such a voluntary desegregation program. The KCMSD thus is left with the task of attempting to desegregate a currently 74% minority school district and the extraordinary challenge of attempting to draw white students into the central city district voluntarily, without the help or even the cooperation of the surrounding districts.

REASONS FOR GRANTING THE PETITION

A. The Plurality Opinion's Holding That School Districts May Not Be Required to Participate in a Desegregation Remedy Unless Each Has Been Shown to Have Committed an Independent Constitutional Violation, Separate From State Interdistrict Violations, Is Contrary to Controlling Decisions of This Court on a Matter of Fundamental Importance.

The Eighth Circuit's plurality opinion is directly contrary to *Milliken* v. *Bradley*, 418 U.S. 717 (1974), where this Court defined the circumstances under which school districts may be liable for interdistrict school segregation:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state *or* local school districts, *or* of a single school district, have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. [418 U.S. at 744-45 (emphasis added).]

Under *Milliken*, "racially discriminatory acts of the state" that are a substantial cause of interdistrict segregation are alone sufficient to justify a cross-district remedy.[47] As Judge Arnold pointed out in his opinion below, "[n]umerous other portions of *Milliken* further evidence the Court's view that an interdistrict remedy involving a school district may be based on discriminatory acts of the state or other school districts with interdistrict segregative effects on the school district in question."[48]

Just two terms after *Milliken*, in *Hills* v. *Gautreaux*, 425 U.S. 284 (1976), the Court considered whether *Milliken* limited the power of a district court to order relief beyond city limits for discrimination in public housing in the absence of a finding that the suburbs committed violations. The Court once again stressed that the infirmity with the interdistrict remedy in *Milliken* was that it lacked "the necessary predicate of a constitutional violation by [the suburban] entities *or* of the identification within them of any significant segregative effects resulting from the Detroit school officials' unconstitutional conduct."[49] The Court's repetition of this formulation throughout the *Hills* opinion emphasizes that proof of effects on the surrounding districts is a sufficient alternative method of establishing the appropriateness of their participation in an interdistrict remedy.[50]

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[47] 418 U.S. at 745.

[48] "*See, e.g.*, [418 U.S.] at 745 ('With no showing of significant violation by the . . . outlying school districts *and* no evidence of *any* interdistrict violation or effect' (emphasis added), an interdistrict remedy was improper); *id.* at 748 (interdistrict relief unjustified because ' . . . there has been no showing that either *the State* or any of the . . . outlying districts engaged in activity that had a cross-district effect' (emphasis added)); *id.* at 750-51 (discussing state activities as possible bases for interdistrict relief)." 807 F.2d at 687-88 (opinion of Arnold, J., concurring in part and dissenting in part) (App. 144a-45a).

[49] 425 U.S. at 294 (emphasis added).

[50] *E.g.*: "The Court's holding [in *Milliken*] that there had to be an interdistrict violation *or* effect before a federal court could

The Eighth Circuit plurality opinion in this case upholds a district court ruling that plainly misreads the *Milliken* holding. Chief Judge Clark's June 5, 1984 opinion dismissing the defendant school districts surrounding KCMSD indisputably required proof of "credible [and] substantial evidence of a constitutional violation by these SSDs," [51] despite *Milliken*'s holding that proof of interdistrict effects from the violations of the State would be sufficient to warrant inclusion of these districts in the remedy. Throughout the opinion, Judge Clark held the plaintiffs' evidence to a standard requiring proof of intentional discrimination by each district with substantial segregative effects on the KCMSD: "Absent a finding of liability on the part of each SSD, they cannot be compelled to participate in an interdistrict plan." [52] The court thus "rejected plaintiffs' 'effects' argument which would have held the SSDs liable and incorporated them in an interdistrict remedy on the basis of alleged wrongs committed by other actors, *e.g.*, the state." [53] Judge Clark expressly stated that he believed this standard was required by *Milliken*: "The linchpin of an interdistrict case, as declared by the Supreme Court, is whether there has been a racially discriminatory act by each defendant that substantially causes segregation in another district. *Milliken* v. *Bradley*, 418 U.S. 717, 745 (1974) . . . ." [54]

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order the crossing of district boundary lines . . . ." *id.* at 296 (emphasis added); "The Court in *Milliken* required either a showing of an interdistrict violation *or* a significant segregative effect '[b]efore the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes.'" *Id.* at 296 n.12, quoting *Milliken*, 418 U.S. at 744 (emphasis added).

[51] June 5, 1984 Order at 3 (App. 278a).

[52] *Id.* at 103 (App. 512a-13a).

[53] *Id.* at 97 (App. 497a).

[54] June 5, 1984 Order at 5-6 (App. 285a). *Accord id.* at 14 (App. 304a) ("the majority [in *Milliken* demanded that] there be

The plurality opinion recognized that the district "court's order admittedly emphasizes the absence of culpability of the suburban districts." [55] Nevertheless, the plurality relied on the district court's findings and conclusions that were based upon and unavoidably affected by its misreading of *Milliken*. The plurality opinion permitted these erroneous legal conclusions and infected findings to stand,[56] and reinforced the district court's misreading of *Milliken*:

> The district court first carefully considered whether the SSDs had violated the Constitution. It found

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a violation, or *cause*, by each defendant district as well as an interdistrict *effect*" [emphasis in original]).

[55] 807 F.2d at 672 (App. 65a).

[56] For example, the plurality opinion suggests that the district court "found no evidence that white families had been lured to or black families discouraged from living in the SSDs." 807 F.2d at 664, citing June 5, 1984 Order at 34-35 (App. 23a). In fact, at the cited page of the district court's order, that court actually stated, consistent with its erroneous view of *Milliken*, that "[t]here is no evidence that *any school official of the SSDs acted* to lure white families or to discourage black families from moving into their districts." June 5, 1984 Order at 34-35 (App. 353a) (emphasis added).

The plurality opinion also concluded that "none of the alleged discriminatory actions committed by the State or the federal defendants had caused any significant current interdistrict segregation." 807 F.2d at 662 (App. 13a-14a). In fact, in assessing the acts of the FHA, for example, the district court once again made clear that it was searching for a constitutional violation by each of the surrounding school districts:

> Dr. Tobin also testified regarding FHA practices and their effect on the housing industry. (Tr. 13,081). These practices, however, are totally beyond the control of any particular school district. No connection was made between actions by FHA or other government officials and any SSD official. [June 5, 1984 Order at 39 (App. 364a).]

The plurality nevertheless adopted the district court's approach to the facts precisely because it accepted fully that court's misreading of the *Milliken* legal standard.

> they had not. Indeed, the district court concluded that to award relief in this case would, as the Court concluded in *Milliken*, "impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy." 418 U.S. at 745 . . . . Order of June 5, 1984 at 96. It further found that the Jenkins class had not established any facts or omissions *by the SSDs* "which have had a substantial segregative impact in any other district." The district court was compelled to make this inquiry by *Milliken* and *Hills*, stressing as they do the significance of the commission of a constitutional violation. [807 F.2d at 672 (App. 63a-64a) (footnote omitted) (emphasis added).]

Because of this misreading of *Milliken*, the district court and the Eighth Circuit plurality never actually engaged in an analysis of whether State violations had substantial segregative effects in the surrounding districts. The district court's references to effects on the surrounding districts were made under an erroneous legal standard for interdistrict liability which misread this Court's cases. These supposed findings, which often are really conclusions of law or observations that fall short of actual findings of fact, "rest on an erroneous view of the law [and] may be set aside on that basis." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982).[57] Given the district court's approach, it was inappropriate for the plurality to view the judge's so-called findings of fact as a barrier to the thorough appellate review necessary to correct his erroneous reading of the law. As Judge Arnold pointed out in his concurring and dissenting opinion:

> [T]he District Court never finally determined whether or what current interdistrict segregation is attributable to [the] housing violations. Having

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[57] *Accord, Thornburg* v. *Gingles*, —— U.S. ——, 106 S. Ct. 2752, 2782 (1986); *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 501 (1984).

> concluded that the SSDs could not be required to participate in an interdistrict remedy, assessing the interdistrict effects of housing discrimination by the State was a task the District Court no longer found necessary. [807 F.2d at 690 (Arnold, J., concurring in part and dissenting in part) (App. 157a).]

The plurality's acceptance of the district court's misreading of *Milliken* also required it to relegate prior cases correctly interpreting *Milliken* and *Hills* to the nonexistent category of "gerrymandering" cases. The plurality thus effectively erected a new rule—that interdistrict effects of a constitutional violation give rise to an interdistrict remedy only where those effects are caused by the gerrymandering of boundaries [58]—that is contrary to the opinions of this Court. In *Milliken*, the Court explained that a situation "where district lines have been deliberately drawn on the basis of race" is but one illustration of a case in which "an interdistrict remedy might be in order." [59] In the same sentence, the Court specified that "where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district," [60] interdistrict relief would be justified as well. In concurrence, Justice Stewart specified that "[w]ere it to be shown, for example, that state officials had contributed to the separation of the races . . . by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate." [61]

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[58] 807 F.2d at 673-74 (App. 69a-72a).

[59] *Milliken*, 418 U.S. at 745. *See also Evans* v. *Buchanan*, 416 F. Supp. 328, 340 (D. Del. 1976), *aff'd*, 555 F.2d 373 (3d Cir. 1977) (*en banc*) (*Milliken*'s "specification of the deliberate drawing of lines to achieve segregation was by way of example, not limitation").

[60] *Milliken*, 418 U.S. at 745.

[61] *Id.* at 755 (Stewart, J., concurring).

As Judge Arnold pointed out in dissent, the plurality opinion does not explain "how or why State discrimination in drawing school boundaries is to be distinguished from State discrimination in housing." [62] State-mandated one-race schools, interdistrict transfers of black students, and housing discrimination were as effective in the Kansas City area as any boundary line in keeping blacks in the KCMSD, drawing blacks moving to the area into the KCMSD, and eliminating the black communities that once existed in the surrounding districts.

B. The Plurality Opinion's Holding Contributes to Growing Conflict in the Circuits Concerning the Principles Set Forth in Decisions of This Court.

The Eighth Circuit's plurality opinion represents the latest entry on a lengthening list of conflicting decisions by courts in several circuits concerning the test to be applied to determine liability in interdistrict school desegregation cases. This Court should grant certiorari so that the KCMSD and its students will be afforded adequate interdistrict relief for the State's constitutional violations, as has been afforded to remedy similar violations in Indianapolis, Wilmington, Pittsburgh, and elsewhere.

The plurality opinion relied upon decisions from the Fourth, Fifth, and Sixth Circuits to support its affirmance of the district court's misreading of *Milliken* at issue here. In *Bell* v. *Board of Education*, 683 F.2d 963 (6th Cir. 1982), the court "decline[d] to accept" the argument "that a school board otherwise innocent of segregative intent is liable for the discriminatory housing practices of other governmental agencies." [63] Similarly, in *Goldsboro City Board of Education* v. *Wayne County Board of Education*, 745 F.2d 324 (4th Cir. 1984), the court held that "[a]n independent school district which

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[62] 807 F.2d at 689 n.5 (Arnold, J., concurring in part and dissenting in part) (App. 153a-54a).

[63] 683 F.2d at 968.

has not caused segregation in a neighboring independent district has no duty to rectify a racial imbalance in the other district." [64] The plurality in the instant case also relied heavily on two Fifth Circuit decisions, *Lee* v. *Lee County Board of Education*, 639 F.2d 1243 (5th Cir. 1981), and *Taylor* v. *Ouachita Parish School Board*, 648 F.2d 959 (5th Cir. 1981), for the proposition that courts cannot impose an interdistrict remedy on "truly autonomous local school districts" that may have been affected by an interdistrict constitutional violation unless there is proof of independent wrongdoing by those districts.[65]

In contrast to these decisions from three circuits relied upon by the district court and plurality opinion in this case are decisions from the Third and Seventh Circuits which clearly and unequivocally stand for the proposition that, under the standards of *Milliken*, interdistrict relief is appropriate to remedy an interdistrict violation having current segregative effects in the schools, whoever the governmental violator may be, and without proof of interdistrict violations by *each* affected district. In *Evans* v. *Buchanan*, 393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975), for example, this Court affirmed a decision by a three-judge court that consideration of interdistrict relief is appropriate if "there have been racially discriminatory acts of the state *or* local school districts causing interdistrict segregation." [66] In *Evans*, the three-judge court appropriately ordered interdistrict relief for interdistrict violations by federal, state, and local officials, despite the fact that the court found the suburban school

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[64] *Id.* at 328 (citing *Bell* v. *Board of Education*, 683 F.2d at 963).

[65] *See* 807 F.2d at 666, 669 n.16, 670, 672, 679-80 (App. 34a, 49a-51a, 55a-56a, 66a-67a, 100a-04a).

[66] 393 F. Supp. at 432 (emphasis added). *Accord, Hoots* v. *Pennsylvania*, 672 F.2d 1107 (3d Cir.), *cert. denied*, 459 U.S. 824 (1982), *aff'g*, 510 F. Supp. 615, 619-20 (W.D. Pa. 1981) ("multi-district remedy can be applied to surrounding districts that have not been found to have committed a constitutional violation themselves").

districts themselves to have been unitary for several years.[67]

The claim by the defendant school districts in *Evans* that, under *Milliken*, "no interdistrict remedy can be ordered to include them, unless they themselves have been guilty of a violation," [68] was squarely rejected by the district court there, and affirmed by the *en banc* Third Circuit. In contrast to the decision below, the *Evans* court recognized that the surrounding districts' contention "misread" *Milliken* and that "the Chief Justice's opinion in *Milliken* made clear that action by the *State* which caused inter-district segregation would be sufficient to allow an inter-district remedy." [69] *Evans* cannot be reconciled with the holding of the plurality in the instant case that the district court's findings that the surrounding districts had become unitary "*compel* the conclusion that there be no further intervention by federal courts with the SSDs." [70]

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[67] 393 F. Supp. at 437-38. The plurality's characterization of *Evans* as a gerrymandering case is wrong. The court in *Evans* specifically based its interdistrict remedial order on evidence that was not boundary-related. The court first reviewed the facts—virtually identical to those in the instant case—showing that "during the period before *Brown I*, there was substantial interdependence of the Wilmington and suburban school systems." 393 F. Supp. at 433. That "interdependence" took the form of interdistrict transfers; participation of governmental entities in housing violations, including recordation of restrictive covenants; and the adoption by State and school officials of policies such as optional attendance zones and interdistrict transportation of private school students. *Id.* at 433-38. Before ever reaching the question of the consolidation and reorganization legislation that pertained to the boundary violations, the *Evans* court concluded that the conduct noted above "constitutes segregative action with interdistrict effects under *Milliken*." *Id.* at 438.

[68] *Evans*, 416 F. Supp. at 340.

[69] *Id.* (emphasis in original).

[70] 807 F.2d at 681 (App. 109a) (emphasis added); *see also id.* at 680 (App. 105a-06a).

The issue was again confronted in *United States* v. *Board of School Commissioners of Indianapolis*, 573 F.2d 400 (7th Cir.), *cert. denied*, 439 U.S. 824 (1978), where the court approved interdistrict relief to remedy constitutional violations committed only by the state, since the violations had significant interdistrict effects.[71] In sharp juxtaposition to the plurality opinion here, the Seventh Circuit stated that school districts affected by the state's inter-district violations cannot be omitted from the remedy on the grounds of their supposed "innocence":

> The suburban school officials may not maintain that their districts should be excluded from any interdistrict remedy if they are found innocent of committing any constitutional violations because they should not be held responsible for the acts of the state legislators or other state subdivisions such as a local housing authority or a zoning board. The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of

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[71] 573 F.2d at 410. Like *Evans*, the Indianapolis case also cannot be characterized simply as a gerrymandering case, for interdistrict liability there was based upon housing violations separate and apart from boundary violations. The court held that an interdistrict violation was established:

> by the action of such official bodies in locating [housing] projects within [city school district boundaries], as well as the opposition of the suburban governments to the location of public housing within these borders, [which] were racially motivated with the invidious purpose to keep blacks within Indianapolis and [the city school district], and to keep the territory of the added suburban defendants segregated for the use of whites only. [*United States* v. *Bd. of School Comm'rs of Indianapolis*, 456 F. Supp. 183, 189 (S.D. Ind. 1978), *aff'd in relevant part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980)].

It is clear that the court in the Indianapolis case relied on the housing violations in support of the interdistrict remedy because it determined the number of students it ordered transferred by reference to the number of students affected by these housing violations. 456 F. Supp. at 189.

responsibility among various agents. [573 F.2d at 410, citing *Cooper* v. *Aaron*, 358 U.S. 1, 15-17 (1958)].

The importance of this issue on which the circuits are so directly in conflict can hardly be exaggerated, for the plurality opinion, if it stands, would ensure that the vast majority of black students in the Kansas City area would remain locked in a predominantly black inner city school district comprising only one-fourth of a city that is 73 percent white. The approach of four Eighth Circuit judges would thus, in the words of Chief Judge Lay, condemn Kansas City "to racially segregated schools and a segregated community for decades to come." [72] This would be so despite the fact that similar constitutional violations in other circuits have resulted in the development of meaningful and constructive interdistrict desegregation remedies. This present state of conflict in the circuits over a matter of such extreme importance underscores the need for this Court to clarify this critical Fourteenth Amendment issue.

CONCLUSION

We respectfully urge the Court, for all of the reasons set forth above, to grant a writ of certiorari.

Respectfully submitted,

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